Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL D. FERNA,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When does the accrual period commence for Petitioner's claim against the government under the Federal Tort Claims Act when the government's involvement as a cause of the harm to Petitioner was not known and could not have been known through the exercise of reasonable diligence at the time Petitioner suffered the harm?

LIST OF PARTIES

The following individuals and entities are parties in the District Court and Court of Appeals below:

Petitioner Michael D. Perna, as plaintiff;

Respondent United States of America, Respondent Ronald R. Previte, Respondent New Jersey Division of State Police, John Does I-V, fictitiously named New Jersey State Police Officers, jointly, severally and in the alternative, Respondent Special Agent of the Federal Bureau of Investigation John J. Terry, and Respondent Special Agent of the Federal Bureau of Investigation James T. Maher, as defendants.

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OPINIONS BELOW

The District Court's unpublished opinion (Pisano, J.) dismissing the case is printed in the Appendix, *infra*, at pp. 7-18. The panel opinion of the Third Circuit Court of Appeals (Alito, Cowen & Lourie, JJ.) affirming the judgment of the District Court is printed in the Appendix, *infra*, at pp. 1-4. The unpublished order of the Third Circuit Court of Appeals denying rehearing is printed in the Appendix, *infra*, at pp. 21-22.

JURISDICTION

The District Court entered its order dismissing Petitioner's claims on July 16, 2001. The Court of Appeals affirmed the order of the District Court on June 5, 2002, and subsequently denied rehearing on August 26, 2002. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(Set forth verbatim in Appendix, *infra*, pp. 65-66.)

28 U.S.C. § 2401(b).

28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Statement of Facts

Respondent Ronald Previte is former police officer now an admitted mafia captain whose self-described

occupation is that of "crook", responsible for shootings and beatings. App. 46-49. From 1992 through 1997, Previte was also a paid informant working for the federal government in connection with its investigation into the Philadelphia La Cosa Nostra Family members and associates. App. 53. Pursuant to his written agreement with the government, Previte was forbidden to participate in any unlawful criminal activities, initiate plots to commit criminal acts, participate in acts of violence or engage in any illegal conduct unless the government specifically authorized such activities as necessary for their investigation. App. 55-56. Previte received an annual salary of approximately $96,000.00, plus expenses, as compensation for his services.[1] Previte has admitted that he committed crimes with the government's knowledge while he was acting as a paid informant. App. 47.

Previte's crimes while working as a paid government informant include the extortion of Petitioner Michael D. Perna during 1993 and 1994. At the time, Perna owned and operated an insurance business in Hammonton, New Jersey. App. 24. In November of 1993, Previte demanded upon threat of violence that Perna pay him $30,000.00 as the price for "doing business", i.e., selling insurance, in Atlantic City. App. 25, 36. Previte took Perna to a wooded area, frisked him, verbally berated and threatened him, and told him that he and his family would be in danger if he resisted payment. App. 25, 26, 36. Previte later informed Perna that if he did not pay, his father and his two daughters would be in danger. App. 26. Previte told Perna

[1] Newspaper accounts report the FBI paid Previte more than $489,000.00 from 1992 through 1997. App. 48.

that he was "untouchable", that he worked for a mafia boss, and that if Perna went to the authorities, he and his family would be the victims of unexplained accidents. App. 26. Based on these threats, Perna paid Previte $10,000.00. App. 25-26.

Perna reported Previte's extortions to the New Jersey Division of State Police and asked for their assistance. App. 40. Despite Perna's repeated pleas, the New Jersey Division of State Police failed and refused to provide assistance or protection to Perna. App. 40. Perna's Complaint alleges that the New Jersey Division of State Police was aware of Previte's status as a paid government informant at the time of Perna's complaints, but did nothing. App. 38.

In May of 1994, Previte again extorted Perna. He appeared at Perna's place of business, punched his fist through Perna's office door and threatened to murder Perna and his family unless Perna paid an additional $20,000.00 within two days. App. 37. Fearing for his safety and for the safety of his family, and abandoned by the New Jersey Division of State Police, Perna paid. App. 37. Fearing further extortions, Perna thereafter dissolved his insurance business and fled the State of New Jersey. App. 26.

In 1995, Perna also reported Previte's criminal conduct to the federal government. App. 9. Perna's Complaint alleges that despite the government's knowledge of Previte's criminal acts against Perna, the government both concealed its relationship with Previte from Perna and failed to supervise and/or control Previte. App. 37-39.

On or about June 29, 1999, Perna learned for the first time through a newspaper article[3] that Previte had been a paid informant for the government during the time Previte was also extorting Perna. App. 26. Perna filed his Federal Tort Claims Notice on October 20, 1999 (reprinted as App. 23).

B. Course of Proceedings and Disposition Below

Perna filed his complaint against the United States, FBI special agents John J. Terry and James T. Maher, Previte, and the New Jersey Division of State Police in the United States District Court for the District of New Jersey on September 25, 2000 (reprinted as App. 32). Perna's complaint alleges that Previte committed criminal acts and intentional torts against him and that the United States and the New Jersey Division of State Police breached their duty of care to Perna by allowing Previte's continuing criminal victimization of Perna while Previte was under the government's supervision and control. On December 19, 2000, the United States moved to dismiss and for summary judgment arguing, *inter alia*, that Perna's claims were time barred by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2401(b).

The District Court granted summary judgment in favor of the United States on July 16, 2001, on the basis that Perna's claims against the government were time barred. App. 7, 16. In its written opinion, the District

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[3] On June 29, 1999, an article in the Philadelphia Daily News quoted a spokesman for the FBI who disclosed that Previti was an informant and operative for the FBI.

Court applied the "injury and immediate cause" standard for determining when a claim accrues under the FTCA as set forth by the Third Circuit in *Zelenzik v. United States*, 770 F.2d 20, 23 (3d Cir. 1985). Under that standard, "a claim accrues when the injured party learns of the injury and its immediate cause." *Id.*

Applying the injury and immediate cause rule to the facts of Perna's case, the District Court found that Perna learned of his injury in 1993 and 1994, when Previte committed his felonious criminal actions. App. 14. The District Court concluded that the statute of limitations began to accrue at that point as to all defendants, including the United States, and that Perna failed to promptly file an appropriate civil action against Previte within two years of the tortious events. App. 14. Even though the District Court acknowledged that Perna alleged in his Complaint that he did not know until 1999 of the government's involvement in the case, Previte's agreement to work for the government, and the government's supervision of Previte, the District Court found that Perna knew "at least one possible defendant, Previte, was responsible for his injuries" in 1993 and 1994. The District Court reasoned that requiring knowledge of the United States' involvement before the statute of limitations started to run against the government "would make every accrual date indefinite as to unknown possible parties." App. 14. Any resulting harshness, the District Court added, "is implicit in statutes of limitations generally." App. 14.

The District Court conceded that had the government actively concealed its role as a cause of Perna's injury, such misconduct would have tolled the accrual of Perna's claim against the government. App. 16. However, despite the allegation of exactly such active concealment in Perna's

Complaint and arguments to the District Court, the District Court held that it was Perna's burden to demonstrate such misconduct by the government and found that Perna had not met this burden. "Perna has not presented any evidence that the United States-Defendants in any way obstructed his efforts to sue Previte, seek protection from Previte's violent acts, or discover his status as a confidential informant for the FBI." App. 16. The District Court placed the burden on Perna to provide evidence of active concealment by the government of its involvement in the harm to Perna, but granted the government's motion for summary judgment on this point without the benefit of either an evidentiary hearing or even allowing Perna an opportunity to conduct any discovery. Perna appealed the District Court's decision to the Third Circuit.

A panel of the Third Circuit Court of Appeals affirmed the judgment of the District Court on June 5, 2002, on the basis that Perna's claim was time barred. In explaining its decision, the Third Circuit concluded that it was unable to distinguish Perna's case from *Zelenzik v. United States*, 770 F.2d 20 (3d Cir. 1985) and must remain faithful to prior panel precedent. App. 3. Notably, however, the Third Circuit admitted that "it would have been very difficult – and perhaps impossible – for Perna to discover Previte's involvement with the FBI prior to the publication of the 1999 newspaper article." App. 3.

The Third Circuit did not reach Perna's argument regarding the District Court's decision to deny him an evidentiary hearing or discovery. It is clear from *Zelenzik*, however, that the Third Circuit agrees with the District Court's views on the effect of active concealment. *Zelenzik*, 770 F.2d at 23 ("When the government actively conceals its own wrongdoing by misrepresentation, there may well be

equitable reasons for tolling the statute of limitations"). It is implicit from the Third Circuit's failure to address Perna's plea for an evidentiary hearing and the right to conduct discovery before a motion on summary judgment may be decided that the Third Circuit also agrees with the District Court's decisions in this regard.

On August 26, 2002, the Third Circuit denied Perna's Petition for Rehearing En Banc. App. 21.

REASONS FOR GRANTING THE WRIT

A. Review Is Warranted Because the Third Circuit's "Injury and Immediate Cause" Rule as Applied to Bar Petitioner's Non-Medical Malpractice Tort Claim Under the Federal Tort Claims Act Conflicts With Decisions of Other Circuits.

Review is warranted in this case to clarify the appropriate application of the two-year statute of limitations under the FTCA, 28 U.S.C. § 2401(b). The Third Circuit held that knowledge by Perna of the identity of the immediate cause of his harm, in this case, Previte, sufficed to trigger the accrual period against the government even though the government's role as a cause of the harm was not known to Perna. The better reasoned approach, as applied by other Circuit Courts of Appeal, starts the two-year accrual period when a reasonably diligent claimant knows or should know of the government as a cause of the harm.

In *United States v. Kubrick,* 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), this Court examined the statute of limitations set forth under the FTCA, found at 28 U.S.C. § 2401(b), which provides, in relevant part, that

"a tort claim against the United States shall be forever barred unless presented in writing to the appropriate Federal agency within two years after such claim accrues. . . . " Kubrick had asserted a claim under the FTCA for hearing loss sustained more than two years earlier as a result of allegedly negligent treatment he received from a Veteran's Administration hospital. The issue in *Kubrick* was whether a claim "accrues" under the FTCA "when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice." *Id.* at 113. This Court distinguished between ignorance by a plaintiff of his legal rights and "ignorance of the fact of his injury or its cause." *Id.* at 122. Finding that Kubrick fell into the former category, this Court barred the claim.

Lower courts have since struggled with the question of what constitutes ignorance of the fact of injury or its cause such as to prevent accrual of a plaintiff's claim. One view, as expressed by the Third Circuit in *Zelenzik v. United States*, 770 F.2d 20 (3d Cir. 1985), is that the claim accrues against the government when the fact of the injury and its immediate cause are known to the plaintiff, without regard to whether plaintiff was aware of the government's role or would have discovered the government's role through the exercise of reasonable diligence. *Id.* at 23. The claimants in *Zelenzik* were not aware of the alleged negligence by the U.S. Immigration and Naturalization service as a cause of their injury until more than two years after they suffered the harm. The Third Circuit nonetheless barred their claim against the government.

Other Circuits apply a different test. For example, in *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985), a wrongful death medical malpractice case, the Seventh

Circuit held that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." *Id.* at 59. This view recognizes that it is knowledge of the government's involvement that matters in terms of triggering the statute of limitations, not some "independent cause that would not lead anyone to suspect that the government had been responsible for the injury." *Id.* The *Drazan* Court held that the statute of limitations against the government "begins to run either when the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause – whichever comes first." *Id.* (citations omitted).

The Third Circuit distinguishes between medical malpractice cases and other torts. For example, in *Hughes v. United States*, 263 F.3d 272, 277 (3d Cir. 2001), a medical malpractice case, the Court both followed and quoted with approval from *Drazan*, "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause [failure to diagnose], not just of the other cause [lung cancer]." Yet, as evidenced by its reliance on *Zelenzik* in dismissing Perna's claim, the Third Circuit applies a different standard to non-medical malpractice cases.

The Third Circuit's view on non-medical malpractice cases is at odds with that of other Circuits, particularly the Second, Eighth and Eleventh Circuits. For example, the Eighth Circuit in *United States Bureau of Prisons v.*

Garza, 284 F.3d 930, 934 (8th Cir. 2002) explained as follows:

> A claim generally accrues for FTCA purposes when the plaintiff is injured, *Osborn v. United States*, 918 F.2d 724, 731 (8th Cir.1990), but might not accrue until the plaintiff knows or reasonably should know of both an injury's existence and its cause, *Slaaten v. United States*, 990 F.2d 1038, 1041 (8th Cir.1993). Although some precedent suggests the latter definition has been used primarily in medical malpractice cases, *see, e.g.*, *K.E.S. v. United States*, 38 F.3d 1027, 1029 (8th Cir.1994), we find, based on authority addressing a diverse array of tort claims, that its application is not so limited and is appropriate for the situation at hand, *see, e.g.*, *Lhotka v. United States*, 114 F.3d 751, 753 (8th Cir.1997) (applying reasonable knowledge definition in trespass and nuisance claim brought pursuant to FTCA); *Slaaten*, 990 F.2d at 1039, 1041 (applying same definition in conversion claim brought pursuant to FTCA); *Diaz v. United States*, 165 F.3d 1337, 1340 (11th Cir.1999) (indicating the court was "persuaded by the opinions in the majority of Circuits that have . . . extend[ed] the diligence-discovery accrual rule to wrongful death actions brought under the FTCA"). "The rationale behind the modified rule is to protect plaintiffs who are blamelessly unaware of their claim because the injury has not yet manifested itself or because the facts establishing a causal link between the injury and the [tortious activity] are in the control of the torfeasor or are otherwise not evident." *Diaz*, 165 F.3d at 1339.

In *Garza*, the estate of a woman killed by a prisoner who had escaped from a halfway house brought suit for

the alleged negligence of a federal employee for failing to notify local authorities of the escape. The Court held that the claim against the government would not accrue until the plaintiff knows or reasonably should know of both the injury's existence and its cause, including its government cause, and refused to limit such a rule to medical malpractice cases. *Id.* at 934.

In *Diaz v. United States*, 165 F.3d 1337 (11th Cir. 1999), while the underlying claim was for a wrongful death caused by the alleged medical malpractice of a prison psychologist, the Eleventh Circuit explained that its decision would be the same without the medical malpractice element. "Furthermore, even in non-malpractice wrongful death cases, the causal link to the government may be obscured." *Id.* at 1340. For the Eleventh Circuit, the nature of the underlying tort is irrelevant. Instead, the issue is whether the plaintiff knows or should know of the causal link to the government. *Id.*

> In situations, such as Mrs. Diaz's case, where there are allegedly multiple causes of death, we agree with the Seventh Circuit: "The cause of which a federal tort claimant must have notice for the statute of limitations to begin to run is the cause that is in the government's control, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury. The notice must be not of harm but of iatrogenic [doctor-caused] harm, though, as Kubrick holds, not necessarily of negligent iatrogenic harm." *Drazan*, 762 F.2d at 59.

In *Kronish v. United States*, 150 F.3d 112 (2nd Cir. 1998), *cert. denied*, 531 U.S. 1078, 121 S.Ct. 775, 148 L.Ed.2d 673 (2001), the plaintiff alleged that the CIA

injured him when it slipped him a dose of LSD without his knowledge. The Second Circuit applied the diligent discovery rule and concluded that the plaintiff knew that the CIA had performed LSD tests on him more than two years prior to bringing his claim. *Id.* at 121-122. No alleged medical malpractice was involved.

In this case, Perna has alleged multiple causes of his injury – the felonious acts of Previte and the government's negligence in failing to supervise or control Previte. Perna neither knew nor had any reason to suspect the government's role as a cause of his injuries until the 1999 newspaper article. The test applied by the Third Circuit to bar Perna's claim varies from the test that would have been applied to his claim had the matter been before courts in the Second, Eighth or Eleventh Circuits. The validity of a claim against the federal government should not turn on an accident of geography. It is important that a single, consistent rule be applied across the entire United States.

CONCLUSION

For all the foregoing reasons, Petitioner Michael D. Perna respectfully submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3051

MICHAEL D. PERNA,

Appellant

v.

UNITED STATES OF AMERICA;
RONALD R. PREVITI; NEW JERSEY
DIVISION OF STATE POLICE;
JOHN DOES I-V, fictitiously
name [sic] New Jersey State Police
Officers, jointly, severally
and in the alternative;
JOHN J. TERRY, Special Agent of the
Federal Bureau of Investigations;
JAMES T. MAHER, Special Agent of the
Federal Bureau of Investigations

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(Dist. Court No. 00-cv-04647)
District Court Judge: Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a)
May 10, 2002

Before: ALITO, COWEN, and LOURIE[1], Circuit Judges

(Opinion Filed: June 5, 2002)

MEMORANDUM OPINION OF THE COURT

PER CURIAM:

Michael Perna filed this action against the United States, New Jersey, and others asserting claims under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, *et seq.* and the New Jersey Tort Claims Act, N.J.S.A. 59:2-2, as well as other state-law claims. The claims arose from the alleged assault, battery, false imprisonment, and extortion of Perna by Ronald R. Previti in 1993 and 1994. Previti was acting as a confidential informant for the Federal Bureau of Investigations when the alleged misconduct took place. The District Court held that Perna's FTCA claim was barred by the applicable statute of limitations and granted summary judgment. The District Court declined to exercise jurisdiction over the state law claims. On appeal, Perna challenges the District Court's summary judgment order.

The issue presented for review is whether the District Court properly held that Perna's FTCA claim was barred by the statute of limitations. Perna argues that because he could not have discovered all critical facts pertaining to his injury prior to June of 1999, the District Court should

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[1] The Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

have applied a diligent discovery rule instead of the injury and immediate cause standard.

In order to file suit under the FTCA, an injured party must present the claim to the appropriate federal agency within two years after the claim accrued. *See* 28 U.S.C. § 2401(b). Perna's injuries occurred in 1993 and 1994. He filed his claim on October 20, 1999, shortly after a newspaper article revealed Previti's status as an FBI confidential informant. We recognize that it would have been very difficult – and perhaps impossible – for Perna to discover Previti's involvement with the FBI prior to the publication of the 1999 newspaper article. However, we cannot distinguish this case from *Zeleznik v. United States*, 770 F.2d 20 (3d Cir. 1985), by which we are bound. In *Zeleznik*, the plaintiffs' son was murdered by a man who unsuccessfully surrendered himself to the INS prior to the murder. The Zelezniks discovered the INS's failure to detain the man eight years after the murder, and they promptly filed suit under the FTCA. The district court dismissed the claim as time barred. The Zelezniks appealed, arguing that "the statute of limitations does not begin to run so long as a reasonably diligent investigation would not have discovered the government's actions." *Id.* at 24. This Court rejected that argument and held that a "claim accrues when the injured party learns of the injury and its immediate cause. . . . The statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Id.* at 23. As it is this Court's longstanding tradition to remain faithful to prior panel precedent, we must agree with the District Court

that Perna's claim is barred by the applicable statute of limitations.

Because the record clearly establishes that the action was filed more than two years after the accrual of Perna's injuries, Perna's argument that the District Court erred when it granted the government's motion for summary judgment must fail. Accordingly, the order of the District Court is affirmed.

App. 5

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-3051

MICHAEL D. PERNA,

Appellant

v.

UNITED STATES OF AMERICA;
RONALD R. PREVITI; NEW JERSEY
DIVISION OF STATE POLICE;
JOHN DOES I-V, fictitiously
name [sic] New Jersey State Police
Officers, jointly, severally
and in the alternative;
JOHN J. TERRY, Special Agent of the
Federal Bureau of Investigations;
JAMES T. MAHER, Special Agent of the
Federal Bureau of Investigations

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(Dist. Court No. 00-cv-04647)
District Court Judge: Joel A. Pisano

Submitted Under Third Circuit LAR 34.1(a)
May 10, 2002

Before: ALITO, COWEN, and LOURIE[1], Circuit Judges

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on May 10, 2002.

After careful review and consideration of all contentions raised by the appellant, it is hereby ORDERED and ADJUDGED that the judgment of the District Court entered on July 16, 2001, be and is hereby affirmed, all in accordance with the opinion of this Court.

Costs taxed against appellant.

ATTEST:

/s/ [Illegible]
Clerk

DATED: June 5, 2002

Certified as a true copy and issued in lieu of a formal mandate on 9/3/02

Teste: /s/ [Illegible]

Clerk, U.S. Court of Appeals for the Third Circuit.

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[1] The Honorable Alan D. Lourie, Circuit Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL D. PERNA, Plaintiff, v. UNITED STATES OF AMERICA, RONALD R. PREVITI, JOHN J. TERRY, Special Agent of the Federal Bureau of Investigation, JAMES T. MAHER, Special Agent of the Federal Bureau of Investigation, NEW JERSEY DIVISION OF STATE POLICE, AND JOHN DOES I-V, fictitiously named New Jersey State Police Officers, jointly, severally and in the alternative, Defendants.	Civil Action No. 00-4647 (JAP) **OPINION** (Filed Jul. 16, 2001)

PISANO, District Judge:

I. INTRODUCTION

Plaintiff Michael D. Perna ("Perna") filed this action on September 25, 2000 asserting claims under the Federal Tort Claims act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, New Jersey Tort Claims Act ("NJTCA"), N.J.S.A. 59:2-2(a), and state law. The four-count complaint asserts causes of action arising from defendant Ronald R. Previti's ("Previti") alleged assault, battery, false imprisonment and extortion of Perna in 1993 and 1994, during which Previti

was serving as a confidential informant for the Federal Bureau of Investigation ("FBI").

Count one of the Complaint asserts a claim under the FTCA against defendants United States of America and FBI Special Agents, John J. Terry and James T. Maher, (collectively, "United States-Defendants") for failing "to intercede, stop or in anyway prevent Previti from perpetrating" crimes against Perna. (Compl., § 17). Perna further alleges that United States-Defendants "did ... conceal, protect, and otherwise provide Previti with a badge of authority upon which to perpetrate crime[s] against [Perna] ... knowing of Previti's illegal and illicit pursuit for his own economic benefit." (*Id.*). Count two of the Complaint asserts that Previti "did ... intentionally assault, batter, falsely imprison, extort and terrorize [Perna]." (Compl., ¶ 20). Finally, counts three and four assert claims under the NJTCA against New Jersey Division of State Police and its unidentified supervisory officers ("State-Defendants") for failing to protect Perna despite having received "direct requests and pleas for assistance by ... Perna." (*Id.* at ¶ 23).

United States-Defendants have filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56 dismissing count one of the Complaint, and Perna filed opposition. United States-Defendants argue, *inter alia*, that the FTCA claim asserted against them are barred by the applicable statute of limitations. Previti and State-Defendants have also filed separately motions to dismiss pursuant to Fed.R.Civ.P. 12(b), and Perna filed opposition. The Court decides the motions without oral argument pursuant to Fed.R.Civ.P. 78. For the reasons stated below, (i) the motion for summary judgment by United States-Defendants is granted;

(ii) the motion to dismiss by Previti is granted; and (iii) the motion to dismiss by State-Defendants is dismissed as moot.

II. STATEMENT OF UNDISPUTED FACTS

Beginning in approximately 1992 and lasting until 1997, Previti served as a confidential informant for the FBI. (United States-Defendants' Statement of Undisputed Facts ("Defs.' Stmt"), ¶ 1). In 1997, Previti ceased to serve as a confidential informant for the FBI and assumed the role of cooperating witness, a role in which he continues to date. (*Id.* at ¶ 2). Perna alleges that Previti perpetrated various crimes against him in 1993 and 1994 while serving as a confidential informant for the FBI. (*Id.* at ¶ 3).

Perna did not file an administrative claim seeking tort relief with the FBI until 1999. (*Id.* at ¶ 7). Prior to the filing of that claim, Perna never sued Previti nor sought information regarding Previti's status as a confidential informant. (*Id.* at ¶ 8). Perna did, however, file a complaint with United States Department of Labor, Office of Inspector General, Office of Organized Crime and Racketeering ("Department of Labor") on October 11, 1995 regarding the extortion incident. (Perna's Statement of Undisputed Facts ("Perna's Stmt."), ¶ 8; Department of Labor Investigative Report, attached as Ex. E to Perna's Opp'n Br.). Department of Labor, however, terminated the investigation into Perna's complaint because he "refused to cooperate in the investigation." (Department of Labor Investigative Report). The Investigative Report noted that Perna "would not agree to testify, turn over [h]is recording or notes. Without this, there was not sufficient evidence to make the case." *Id.*

Perna became aware of Previti's status as a confidential informant for the FBI on June 29, 1999 through a press release. (Perna Stmt., ¶ 10). Perna commenced this action in September 2000.

III. DISCUSSION

A. Summary Judgment Standard

To prevail on a motion for summary judgment, the moving party must establish "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The district court's task is to determine whether disputed issues of material fact exist, but the court cannot resolve factual disputes in a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

In determining whether a genuine issue of material fact exists, the court must view the facts in the light most favorable to the non-moving party and extend all reasonable inferences to that party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Stephens v. Kerrigan*, 122 F.3d 171, 176-177 (3d Cir. 1997). The moving party always bears the initial burden of demonstrating the absence of a genuine issue of material fact, regardless of which party ultimately would have the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its initial burden, the non-moving party must identify, by affidavits or other evidence, specific facts showing that there is a genuine issue for trial. *Id.* at 324. Thus, the non-moving party may not rest upon the mere allegations or denials of its pleadings. *Id.* "[T]he plain language of Rule

56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

B. FTCA Claim

Under the FTCA, "a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency 'within two years after such claim accrues.'" *United States v. Kubrick*, 444 U.S. 111, 113 (1979); 28 U.S.C. § 2401(b).[1] Perna's FTCA claim is therefore time-barred if it accrued prior to January 1, 1997, two years before the date he filed a claim with the FBI.[2] United States-Defendants contend that Perna's FTCA claim is untimely because it accrued no later than the end of 1994, when Previti perpetrated various criminal acts against him. Perna argues that his action is timely because until June 29, 1999, "[t]he Government purposefully concealed the fact that Ronald Previte [sic] was operating as an Agent for the FBI." Perna contends that

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[1] 28 U.S.C. § 2401(b) provides as follows:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after the claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

[2] Because the parties do not specify on which date in 1999 Perna filed his administrative claim with the FBI, the Court will consider January 1, 1997 as the accrual date.

his FTCA claim did not accrue until June 29, 1999, the date on which he first learned about Previti's status as a confidential informant for the FBI.

"The FTCA is a limited waiver of the sovereign immunity of the United States." *Zeleznik v. United States*, 770 F.2d 20, 22 (3d Cir. 1985). "The Supreme Court has admonished that the courts should carefully construe the statute of limitations for the FTCA so as not to extend the limited waiver of sovereign immunity beyond that which Congress intended." *Id.* (citing *Kubrick*, 444 U.S. at 117-18). "The purpose of a statute of limitations is to encourage the filing of claims promptly by giving no more than a reasonable time within which to make a claim." *Id.* "[T]he statute protects defendants from having to defend actions where the truth-finding process is impaired by the passage of time." *Id.* (citing *Kubrick*, 444 U.S. at 117). Generally, for tort actions the cause of action accrues at the time of injury. *Id.* (citing *Kubrick*, 444 U.S. at 120). "In most cases, when a person learns of his injury, he is on notice that there has been an invasion of his legal rights, and that he should determine whether another may be liable to him." *Id.*

The Court finds the Third Circuit's decision in *Zeleznik v. United States*, relied upon by United States-Defendants, to be dispositive on the statute of limitations issue. In *Zeleznik*, the parents of a murdered son filed an administrative claim against the Immigration and Naturalization Service ("INS") approximately nine years after the injury. *Zeleznik*, 770 F.2d at 21. Although the son was murdered on December 20, 1974 by Vernal Walford, the parents did not learn of the INS's alleged negligent involvement in his death until 1982. *Id.* Apparently, a few days prior to the son's death, Walford visited an INS office

and informed an INS employee about his illegal status, his fraudulent possession of a U.S. passport, and his involvement in an illicit drug transaction. *Id.* Despite these confessions, the INS allowed Walford to leave. *Id.* Within two years of this discovery, the plaintiffs filed an action against the INS under the FTCA alleging that the INS was negligent in failing to detain Walford. *Id.*

The Third Circuit in *Zeleznik* held that "a claim accrues when the injured party learns of the injury and its immediate cause" in affirming the district court's dismissal of plaintiffs' FTCA claim as time-barred. *Id.* at 23. In support of its holding, The Third Circuit reasoned that:

> The rationale of the discovery rule as announced in *Kubrick* is that the statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress. The Court in *Kubrick* further held that the accrual date is not postponed until the injured party knows every fact necessary to bring his action. Rather, the Court indicated that the crucial question in determining the accrual date for statute of limitations purposes was whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss. Once the injured party is put on notice, the burden is upon him to determine within the limitations period whether any party may be liable to him.

Zeleznik, 770 F.2d at 23 (citation omitted). The Third Circuit also specifically rejected the plaintiffs' argument that the "injury and immediate cause" standard should not

apply in their case because reasonable investigation begun in 1974 would not have discovered the INS's involvement in their son's death. *Id.* at 23-24. The Third Circuit refused to adopt the reasonable investigation standard advanced by plaintiffs because "it would make every accrual date indefinite as to unknown possible parties." *Id.* at 24. The Third Circuit noted that the harsh consequence of the application of "injury and immediate cause" standard to the plaintiffs' case "is implicit in statutes of limitations generally." *Id.*

The application of the "injury and immediate cause" standard dictates a similar result in this case. Perna learned of his injury between 1993 and 1994 when the alleged assault, battery, false imprisonment, and extortion occurred and he knew at least one possible defendant, Previti, was responsible for his injuries. Perna, however, did not promptly file an action against Previti; instead he waited more than six years to assert such claims. As in *Zeleznik*, the Court cannot excuse Perna's delay based on his argument that he was not aware at the time his claims accrued that another defendant may have negligently contributed to his injuries. *See Kubrick*, 444 U.S. at 123 ("We thus cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted.").

Perna's reliance on the Second Circuit's decision in *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied,* 642 U.S. 1131 (1983), for the proposition that accrual should be tolled until the government's action is discovered is misplaced. *Barrett* held that "[w]hen the government actively conceals its own wrongdoing by misrepresentation, there may well be equitable reasons for tolling the statute of limitations." *Zeleznik*, 770 F.2d at 23.

In *Barret* [sic], the decedent, Harold Blauer, while voluntarily undergoing treatment at the New York State Psychiatric Institute ("Institute"), was used without his knowledge as a human guinea pig by the United States Army in connection with an Army chemical warfare experiment. *Barrett*, 689 F.2d at 326. Blauer died as a result of an injection of a mescalin derivative administered to him by the Army in 1953. *Id.* at 327. Following his death, the Army actively sought to conceal its direct involvement in Blauer's death by insisting that, upon declassification, the source of the drug which killed Blauer be identified as the Army Medical Corps rather than the Army Chemical Corps to create a "deliberate false impression that the drug used on Blauer was administered for therapeutic purposes." *Id.* at 328. In addition, when Blauer's estate brought a tort action in the New York State Court of Claims, the Assistant Attorney General of New York responsible for defending the suit (i) was "forcibly informed" that the suit should be limited to the "medical aspects" of the case; (ii) was urged to postpone indefinitely scheduled deposition of the Institute's doctors; and (iii) was informed "that nobody would be permitted to testify or disclose information 'under threat of prosecution under the Espionage Act,'" by the Army. *Id.* In addition, the Army repeatedly urged that certain Institute documents which could have led to the discovery of its involvement in Blauer's death be turned over to the Army while the litigation was pending to "'place[] them beyond the subpoena power of the plaintiff." *Id.* Finally, when the case settled the Army paid half of the settlement on the condition that its role in Blauer's death be kept secret. *Id.* In 1975, the Secretary of the Army disclosed for the first time that Blauer had died because he was involuntarily used as a test subject in the Army's chemical warfare

experiment, and the plaintiff brought suit against the United States under the FTCA twenty-two years after Blauer's death. *Id.* at 326.

The Second Circuit in *Blauer* found that critical facts concerning causation and who inflicted Blauer's injury were not known and probably not discoverable until the Army made its disclosures in 1975. *Id.* at 329. The Second Circuit reversed the dismissal of the plaintiff's FTCA claim based on the expiration of the two-year statute of limitations because under the unique facts of the case "the path to unmasking who was responsible [even with reasonable effort] may well have been blocked." *Id.* at 330. Unlike the facts of *Barrett*, the critical facts about causation and who inflicted Perna's injury was known to him in 1994.

Moreover, equitable considerations do not warrant the tolling of the statute of limitations. Perna has not presented any evidence that United States-Defendants in any way obstructed his efforts to sue Previti, seek protection from Previti's violent acts, or discover his status as a confidential informant for the FBI. Finally, the Third Circuit has stated that "[t]he facts that a reasonably diligent investigation would not have discovered the defendant's involvement is no longer relevant for the purposes of accrual of the statute of limitations." *Zeleznik*, 770 F.2d at 24. Accordingly, Perna's FTCA claim is barred by the applicable statute of limitations, and the Court grants United States-Defendants' motion for summary judgment on count one of the Complaint.

C. State Law Claims

Count two of the Complaint alleges that "Previti did intentionally assault, batter, falsely imprison, extort and terrorize" Perna. (Compl., ¶ 20). Previti argues, *inter alia*, that count two asserts purely state law claims and, thus, the Court must dismiss count two for lack of subject matter jurisdiction. In opposition to Previti's motion to dismiss, Perna argues that he was also asserting a claim under the FTCA against Previti based on his status as an "employee" of the FBI. Although the Court does not reach the issue of whether Previti was an "employee" of the FBI, such a claim under the FTCA would be barred by the two-year statute of limitations. Thus, the only remaining claims against Previti are state law claims for assault, battery, false imprisonment and extortion, and the Court declines to exercise supplemental jurisdiction over these claims pursuant to 28 U.S.C. 1367(c)(3). Accordingly, Previti's motion to dismiss is granted and count two of the Complaint is dismissed without prejudiced. [sic]

Moreover, the Court, *sua sponte*, also declines to exercise supplemental jurisdiction over Perna's state law claims under the NJTCA against the State-Defendants pursuant to 28 U.S.C. 1367(c)(3). Accordingly, counts three and four of the Complaint are dismissed without prejudice, and the Court dismisses the State Defendants' motion as moot.

IV. CONCLUSION

For the foregoing reasons, (i) the motion for summary judgment by United States-Defendants is granted; (ii) the motion to dismiss by Previti is granted; and (iii) motion to dismiss by State-Defendants is dismissed as moot. The

Court dismisses count one with prejudice and the state law claims, counts two, three and four, without prejudice.

Dated: July 16, 2001

/s/ Joel A. Pisano
JOEL A. PISANO
United States
District Judge

Orig: Clerk
cc: Magistrate Judge J.B. Rosen
All parties
File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL D. PERNA,

Plaintiff,

v.

UNITED STATES OF AMERICA, RONALD R. PREVITI, JOHN J. TERRY, Special Agent of the Federal Bureau of Investigations, JAMES T. MAHER, Special Agent of the Federal Bureau of Investigations, NEW JERSEY DIVISION OF STATE POLICE, AND JOHN DOES I-V, fictitiously named New Jersey State Police Officers, jointly, severally and in the alternative,

Defendants.

Civil Action
No. 00-4647 (JAP)

ORDER

(Filed Jul. 16, 2001)

For the reasons set forth in the Court's decision, dated July 16, 2001, (i) the motion for summary judgment by defendants United States of America, John J. Terry, and James T. Maher is granted; (ii) the motion to dismiss by defendant Ronald R. Previti is granted; and (iii) motion to dismiss by New Jersey Division of State Police is dismissed as moot. The Court dismisses count one with prejudice and the state law claims, counts two, three and four, without prejudice.

/s/ Joel Pisano
JOEL A. PISANO
U.S. District Court Judge

Orig: Clerk
cc: Magistrate Judge J.B. Rosen
All parties
File

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

01-3051

MICHAEL D. PERNA,

Appellant

v.

UNITED STATES OF AMERICA;
RONALD R. PREVITI; NEW JERSEY
DIVISION OF STATE POLICE;
JOHN DOES I-V, fictitiously name [sic] New Jersey State
Police Officers, jointly, severally and in the alternative;
JOHN J. TERRY, Special Agent of the
Federal Bureau of Investigations;
JAMES T. MAHER, Special Agent of the
Federal Bureau of Investigations

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and LOURIE Circuit Judges, and COWEN, Senior Circuit Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

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* As to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

DATED: AUG 26 2002
lw c/cc: LMB
JJB
JBC
JPO

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY 08101

MICHAEL D. PERNA,	:	Civil Action No.
Plaintiff,	:	(Jury)
vs.	:	FEDERAL TORT CLAIMS NOTICE PURSUANT TO 28 U.S.C. §1346(b)(1) & 28 U.S.C. §2671 et seq.
UNITED STATES OF AMERICA,	:	
Defendant.	:	

TO: FEDERAL BUREAU OF INVESTIGATION
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

JANET RENO, ATTORNEY GENERAL
10th & Constitution, N.W.
Washington, D.C. 20590

Pursuant to 28 *U.S.C.* §2671 *et seq.*, more specifically 28 *U.S.C.* §2674 and §2675, notification of claim establishing liability under the Federal Tort Claims Act is given, and a claim for money damages in the amount of $1,000,000.00 for personal injury, property loss and deprivation, pain and suffering and damages as to income, pursuit of employment, relocation expenses and travel expenses is alleged to have occurred by reason of the following incidents and negligence committed by agents of the Federal Bureau of Investigation.

NOTICE

1. *Claimant.* Claimant is Michael D. Perna, residing at 2142 Gypsy Bell Avenue, Las Vegas, Nevada 89123. Claimant is a resident of the State of Nevada and citizen

of the United States, currently 45 years of age, and was at all times relevant to this Complaint a resident of the State of New Jersey, having been born and raised in the State of New Jersey and having fled the State of New Jersey and relocating in the State of Nevada in or about 1995 because of the incidents set forth below.

2. *Place and Date of Incident.* The incidents upon which this claim is based occurred in or about the Town of Hammonton, Atlantic County, New Jersey, commencing on or about May of 1993 and continuing throughout and up to the Fall of 1995. The specific incidents forming the basis of this claim occurred in or about May of 1993, October of 1993, November of 1993 and approximately May of 1994.

3. Michael D. Perna established a company known as Perna & Associates in June of 1984. The principle object of the business at its inception was an insurance agency and brokerage firm for life, investments, auto and homeowners. In approximately November of 1989, the legal entity of the business changed to a partnership and the principle work of the business expanded into estate and financial planning. The company then expanded further into worksite marketing for various employers and companies. The business grew in scope of customers, geographic coverage and gross receipts and profits. The business entity was a financial success and was growing consistently after start-up from June of 1984 to May of 1993.

4. The claimant Michael D. Perna was, in May of 1993, contacted by a business associate, namely Jerry Ferro, who was an insurance agent and third party administrator, namely a health insurance specialist working

with Perna & Associates upon expansion of the business into the casino industry. Mr. Ferro sought the financial assistance of Perna & Associates because men came to his office and demanded $7,500.00 in extortion money. At that time, while there was rumor, hunch and suspicion that Ronald Previti was the individual extorting Ferro, there were no facts or proof regarding same.

5. In or about October of 1993, the claimant learned that his ex-wife Joanne Perna had placed a bet for a friend of hers (Billy Stork) and the friend had lost. The bet was said to be in the area of $7,000.00. The claimant learned that the bet had been placed by his partner, Vince Ciciatello. Perna was told of the debt, and told he should cover it. Perna refused and later learned that the bet was closer to $15,000.00.

6. In or about November of 1993, claimant is told by Ciciatello that another individual named "Smoky" told him that "Ronnie wants 'us' to pay because we do business in Atlantic City". Claimant was told by his partner that they had been threatened by Ronnie and that the claimant was a wise guy for resisting the payment of his wife's bet and resisting payment to Ronnie for the privilege of doing business in Atlantic City. The claimant's partners were told that Ronnie wrote down $30,000.00 on a napkin and that's what he wanted. The partners of Perna & Associates were told that Ronnie would accept $10,000.00 now "and if it was not paid, my family would suffer the consequences". Believing that the demand by Ronnie had something to do with his wife's bet, the claimant agreed to pay and each of the partners gave $1,250.00 as a deposit towards that payment.

7. Thereafter, a second payment was made and claimant told his partner Vince that he wanted to meet Ronnie. A meeting was to be arranged with Ronnie by one Lou Cappuccio. Within days, claimant was beeped and told where to go. He sat in his car and twenty minutes later Ronald Previti appeared. Previti told the claimant that unless he paid, his father and two daughters would be in danger. Previti said that he was untouchable. He told the claimant he worked for a boss and that if the claimant went to the authorities, he and his family would be victims of unexplained accidents.

8. In total, the claimant paid $30,000.00 in extortion money to Ronald Previti.

9. In May of 1993, Ronald Previti went to the claimant's place of business and demanded that the balance be paid. Previti again threatened the claimant with bodily harm and with accidents that would befall his family. Previti proceeded during that meeting to verbally threaten, physically intimidate and destroy property of the claimant while in his own office. Plaintiff paid, dissolved his partnership in Perna & Associates and fled the State of New Jersey.

10. On June 29, 1999, the claimant learned for the first time that Ronald Previti was not merely an individual who as rumored was involved in organized crime, but was instead an informant, operative or assistant of the Federal Bureau of Investigation. The hunches, suspicions and rumors the claimant had heard throughout the course of the aforenoted incidents and thereafter once he left the State of New Jersey, were confirmed as true by spokespersons for the Federal Bureau of Investigation and recorded

for the first time in a June 29, 1999 article in the Philadelphia Daily News. Up to that point, claimant had seen newspaper articles from May of 1993, alleging that Previti was an organized crime figure, but not an informant or operative for the government. The article said that Previti had rejected an opportunity to cooperate with the Federal Bureau of Investigation. In late June, 1999, claimant learned for the first time that Ronald Previti had, during the entire time frame of incidents recounted above, been under the control, supervision and direction of the Federal Bureau of Investigation.

11. The Federal Bureau of Investigation did, at all times relevant hereto, maintain a duty of care to utilize informants and operatives pursuant to F.B.I. Guidelines, standard operating procedures and pursuant to their own rules and regulations. The Federal Bureau of Investigation knew at all times during the incidents recounted in this Notice that Ronald Previti was committing acts of extortion against the claimant and others, was violating F.B.I. Guidelines, rules, regulations and standard operating procedures, knew that Ronald Previti was utilizing his association with the FBI as a form of immunity to perpetrate crimes against the claimant, his business and other citizens in or about the Town of Hammonton. The FBI knew further that the claimant had reported the extortion of Ronald Previti to the New Jersey State Police and to an agent of the FBI and did thereafter fail to act on that information, failed to investigate that claim and did otherwise know that their failure to act pursuant to their sworn duty under the Constitution and the laws of the United States, and constituted negligence, proximately causing the claimant to suffer personal and economic damages and losses.

12. *Witnesses*. Names and addresses of witnesses to the incidents are as follows:

Michael D. Perna
2142 Gypsy Bell Avenue
Las Vegas, Nevada 89123

Louis Pantalone
North Egg Harbor Road
Hammonton, New Jersey 08037

Greg Morano
Waterford-Blue Anchor Road
Winslow Township, New Jersey 08095

Vince Ciciatello
Hammonton, New Jersey 08037

Jerry Ferro
12th Street
Buena, New Jersey 08310

Robert Walker
New Jersey State Police
River Road
Trenton, New Jersey 08625

Martin Tubertini
New Jersey State Police
River Road
Trenton, New Jersey 08625

Ronald Previti
unknown

Mark Soifer, Esquire
1300 Atlantic Avenue
Atlantic City, New Jersey 08401

Joanne Perna
2602 Leeds Avenue
Northfield, New Jersey 08225

William Storck
524 Cains Mills Road
Cologne Lake, New Jersey 08213

Ronald C. Chance
Federal Bureau of Investigation
1800 Atlantic Avenue
Mays Landing, New Jersey 08330

Richard J. Flaster, Esquire
1810 Chapel Avenue West
Cherry Hill, New Jersey 08002

Carl D. Poplar, Esquire
215 Fries Mill Road
Turnersville, New Jersey 08012

Stephanie DeMarco
c/o D&D Specialties
Third & Fairview Avenues
Hammonton, New Jersey 08037

Lou Cappuccio
16 Mill Run
Hammonton, New Jersey 08037

Mike Perna, Sr.
25 Harborwood Drive
Hammonton, New Jersey 08037

Joe Mazzeo
410 French Street
Hammonton, New Jersey 08037

Joe Repa
unknown

Peter Lucca
420 Bellevue Avenue
Hammonton, New Jersey 08037

George Tzferous
c/o Silver Coin Diner
Hammonton, New Jersey 08037

Father Burns
c/o St. Anthony's Church
Route 206
Hammonton, New Jersey 08037

13. *Property Damage*. The property damage includes the loss and destruction of claimant's interest in Perna & Associates, extortion money paid, as well as loss of income and expenses incurred in relocation, and excessive travel to and from New Jersey to maintain family contacts.

14. *Personal Injury*. The negligence of the FBI has caused severe pain and suffering, emotional upset, loss of business pursuits and interests in the State of New Jersey, loss of property interests, violation of claimant's right to free association, residence, pursuit of happiness, protection under the laws of the United States and State of New Jersey, and fear physical injury and death to himself and family.

CLAIM FOR DAMAGES

The claimant asserts a total of $1,000,000.00 for all injuries and damages aforenoted proximately caused by the negligence of the Federal Bureau of Investigation.

I declare under penalty of perjury that the amount of this claim is not unreasonable as to damages and injuries

caused by the negligence by the Federal Bureau of Investigation. I agree to accept such amount as full satisfaction and settlement of this claim.

JACOBS & BARBONE, P.A.
Attorneys for Claimant

BY: [Illegible]
LOUIS M. BARBONE, ESQUIRE

DATED: October 20, 1999

Louis M. Barbone, Esquire (LB-5957)
JACOBS & BARBONE, P.A.
A Professional Corporation
Attorneys at Law
1125 Pacific Avenue
Atlantic City, New Jersey 08401
(609) 348-1125
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL D. PERNA, Plaintiff, v. UNITED STATES OF AMERICA, RONALD R. PREVITI, JOHN J. TERRY, Special Agent of the Federal Bureau of Investigations, JAMES T. MAHER, Special Agent of the Federal Bureau of Investigations, NEW JERSEY DIVISION OF STATE POLICE, and JOHN DOES I-V, fictitiously named New Jersey State Police Officers, jointly, severally and in the alternative, Defendants.	Civil Action No. 00CV4647 (JAP) COMPLAINT

Plaintiff, Michael D. Perna, residing at 2142 Gypsy Bell Avenue, Las Vegas, Nevada 89123, complaining against defendants, says:

JURISDICTION

1. Jurisdiction in this case is pursuant to 28 U.S.C. §1346(b), vesting original jurisdiction in suits against the United States in the District Court. Jurisdiction is additionally found upon the Federal Tort Claim Act, 28 U.S.C. §2674, with respect to the United States' liability for Tort Claims, and §2675, given plaintiff's filing of a Federal Tort Claims Notice on or about October 20, 1999 (Exhibit A), and the federal agency in question, namely the Federal Bureau of Investigation and the Attorney General of the United States having failed to make a final disposition of the claim within six months after said filing. Jurisdiction is further founded upon the waiver of immunity by the United States pursuant to 28 U.S.C. §2680(h) for claims arising out of assault, battery and false imprisonment proximately caused by the acts or omissions of investigative or law enforcement officers of the United States pursuant to 28 U.S.C. §22679.

Plaintiff further invokes the pendent jurisdiction of the Court to hear and decide matters arising under the laws of the State of New Jersey.

VENUE

2. Venue lies in the United States Federal District Court for the District of New Jersey pursuant to 28 U.S.C. §1391.

PARTIES

3. Plaintiff, Michael Perna, was at all times relevant hereto a citizen of the United States and resident of the

State of New Jersey, residing in Hammonton, New Jersey. Plaintiff currently resides as set forth above.

4. Defendant, United States of America, is the named defendant pursuant to 28 U.S.C. §1346(b) in claims for money damages, for personal injury and loss of property caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of their office or employment, in this instance the Federal Bureau of Investigation, the law enforcement agency who employed, supervised and otherwise managed those special agents and supervisory special agents assigned to one Ronald R. Previti, a paid informant of the Federal Bureau of Investigation from approximately July 17, 1992 through October 18, 1999.

5. Defendant Ronald Previti was at all times relevant hereto a resident of the town of Hammonton and a confidential informant paid by the New Jersey State Police as well as the Federal Bureau of Investigation.

6. Defendant John J. Terry was at all times relevant hereto a special agent employed and acting in the performance of duty for the Federal Bureau of Investigation and was a supervising agent of Ronald Previti throughout the time frame set forth above and he is sued in his official capacity.

7. Defendant, James T. Maher, is a special agent employed by and in the performance of duty for the Federal Bureau of Investigation and was a supervisory special agent assigned to oversee, monitor and otherwise maintain the investigation, use of and activities of informant Ronald Previti, and he is sued in his official capacity.

8. Defendant, New Jersey Division of State Police, was and is at all times relevant hereto the state law enforcement agency for the State of New Jersey and it is sued for injuries proximately caused by the acts and omissions its supervisory, command detective personnel performing in the scope of their employment with the New Jersey State Police Organized Crime Bureau and/or Intelligence Bureau pursuant to the dictates of the New Jersey Tort Claims Act, *N.J.S.A.* 59:2-2(a).

9. Defendants, John Doe I-V are fictitiously plead [sic] individuals whose true names and identities are unknown to the plaintiff, but are intended to represent those captains, majors, lieutenants, sergeants, supervisors and detectives that did from 1990 to 1993, utilize and pay Ronald Previti as an informant for the New Jersey State Police, at which time defendants undertook to monitor, control and otherwise superintend the activities of that informant.

FIRST COUNT

10. In or about June of 1984 plaintiff Michael Perna formed, organized and established an insurance agency and brokerage business located in Hammonton, Atlantic County, New Jersey. For approximately five years thereafter, Perna and Associates expanded in terms of client base, variety of insurance products offered, staff and physical plant. In or about November of 1989, plaintiff entered into a partnership agreement with Louis Pantalone and Gregory Morano and the business continued to flourish, expanding into the areas of estate and financial planning. Thereafter, the business expanded further into work site marketing for various employers and companies including

health and voluntary disability contracts for employees at casino hotels in Atlantic City, New Jersey.

11. From approximately May of 1993 to November 1993 plaintiff learned from his partners that Jerry Ferro was being extorted in the amount of $7,500 because of business done in Atlantic City. Around November 1993, plaintiff was also told about a bet allegedly placed by his ex-wife for a friend (Billy Stork) by Vince Ciciatello and Smokey Cirillo in the amount of $7,000.

12. In or about November of 1993, plaintiff was told by his partners that Previti wanted his extortion money and knew plaintiff was resisting payment. Plaintiff was thereafter told by various sources that if he did not pay, his "family would suffer the consequences", "bad people are involved", and further resistance would put his ex-wife and his children in jeopardy. In total, the amount demanded by Previti was $30,000 which ultimately resulted in the plaintiff and his partners paying a "down payment" of $5,000.

13. Approximately December of 1993 plaintiff Perna undertook to meet with Ronald Previti believing he could rationally discuss the circumstances and dissuade Previti from targeting his business and ease his own mind with regard to the threats against his ex-wife and daughters. Plaintiff met Previti for the first time in November of 1993, was taken into a wooded area and frisked. Previti thereafter verbally berated, threatened and physically menace [sic] the plaintiff in telling him that either he paid or he was going to get hurt. Previti was enraged that the plaintiff thought about not paying him, thought about reporting him to the authorities, and told the plaintiff he would either comply with the demands or he would be

passed up to the "next level", leaving the consequences to the plaintiff and his family, "out of his hands".

14. In May of 1994, Previti went to the plaintiff's office, put his fist through the door and then pointed his fists at the plaintiff. He told the plaintiff he needed $20,000 or he'll be killed by his boss. Previti told him, while his fist remained in the plaintiff's face and the plaintiff remained contained and captive in his own office, that if he didn't want problems with his dad or family he would have to pay. Previti repeated the consequences of plaintiff's non-compliance. Plaintiff was given two days to accumulate the sum of $20,000. Plaintiff withdrew $14,000 from his investment account and drew another $6,000 on his credit cards. He placed $20,000 in two envelopes and gave the money to Previti's designee.

15. Defendant Ronald Previti was during the concurrent time frame, specifically from July 17, 1992 to October 18, 1999, a paid informant and operative of the Federal Bureau of Investigation. Pursuant to the agreement between Previti and the FBI, as well as the standard operating procedures of the Federal Bureau of Investigation, Previti was forbidden in participating in any unlawful activity, forbidden from initiating plots to commit criminal acts, from participating in acts of violence or undertaking any illegal conduct unless specifically authorized by the FBI as they deemed necessary for their investigation.

16. Defendant United States of America, did by and through the Federal Bureau of Investigation, as well as by and through defendants Special Agents John Terry and James Maher, recruit, foster and make agreements with defendant Previti for his cooperation as a paid informant

and operative. Defendants did maintain a duty notwithstanding a purported purpose to aid criminal investigations being conducted by the government, to required terms and conditions be placed upon Previti through its agreements and by imposition of the standard operating procedures of the FBI, so as to control, monitor and superintend the activities of Ronald Previti, actually and constructively known by the FBI.

17. Defendants knew at all times relevant hereto that Ronald Previti had been a confidential informant for the New Jersey State Police, had received actual notice of Ronald Previti's illegal activities during and before his association with the FBI, and further knew that Previti was not and would not abide by the terms and conditions prohibiting his own cultivation of criminal schemes with regard to extortion, assault and battery, false imprisonment, terroristic threats and all of the acts and conduct perpetrated against the plaintiff Michael Perna. Defendants Ronald Previti, John J. Terry and James T. Maher did, not withstanding the actions and constructive notice from the New Jersey State Police, and notwithstanding defendant's knowledge and scope of Previti's criminal pursuits while being a confidential informant for the FBI, know of instances unrelated to the lawful investigations, fail to intercede, stop or in anyway prevent Previti from perpetrating crime on citizens such as the plaintiff. Defendants did instead conceal, protect, and otherwise provide Previti with a badge of authority upon which to perpetrate crime against the plaintiff and others knowing of Previti's illegal and illicit pursuit for his own economic benefit.

18. Defendants Ronald Previti, John J. Terry and James T. Maher did knowingly allow and permit defendant Previti to perpetrate assault, battery and false

imprisonment upon the plaintiff by virtue of their failure to exercise reasonable and due care for the health, safety and welfare of the plaintiff, by virtue of their failure to train, instruct, supervise or otherwise control Previti for only lawful purposes. Defendants did breach each and every duty of care due and owing the plaintiff, by their negligent and wrongful acts and omissions and did proximately cause the plaintiff to suffer damages and injury.

WHEREFORE, plaintiff demands judgment against defendant United States of America, and Special Agents John J. Terry and James T. Maher pursuant to 28 U.S.C. §1346(b), and 28 U.S.C. §2680(h), as follows:

A. Compensatory damages;

B. Interest, attorney's fees and costs of suit; and

C. any other relief the Court deems equitable and just.

COUNT TWO

19. Plaintiff repeats and incorporates all previous allegations as if fully set forth herein.

20. Defendant Ronald Previti did at all times relevant hereto intentionally assault, batter, falsely imprison, extort and terrorize the plaintiff.

21. Defendant Previti proximately caused the plaintiff to suffer damages and injuries.

WHEREFORE, plaintiff demands judgment against defendant Ronald Previti as follows:

A. Compensatory damages;

B. Punitive damage;

C. Interest, attorney's fees and costs of suit; and

D. any other relief the Court deems equitable and just.

THIRD COUNT

22. Plaintiff repeats and incorporates all previous allegations as if fully set forth herein.

23. Defendant New Jersey Division of State Police did at all times relevant hereto receive direct requests and pleas for assistance by plaintiff Perna. Plaintiff met with detectives in the New Jersey State Police, told of the criminal acts being committed by defendant Previti, was promised police protection and investigation with regard to the illegal conduct of Previti, and did rely upon representations of police protection and assistance by the New Jersey State Police.

24. Defendants John Does I through V, all supervisory State Police officers, did notwithstanding actual notice of crimes being committed by defendant Previti, conceal, suppress and otherwise refuse to investigate, protect or in anyway provide police services and assistant [sic] to plaintiff Perna in order to protect his life, safety and welfare and that of his family.

25. Defendants did notwithstanding actual notice of the criminal acts being perpetrated by defendant Previti, prevent further assistance and investigation by state police detectives, and allowed a permitted defendant Previti to continue to perpetrate crimes against the plaintiff and others.

26. Defendants, all public employees for the State of New Jersey, all acting in the course of their performance

of duty as state police officers or supervisory state police officers, are liable for the injuries caused to the plaintiff for their acts and omissions pursuant to *N.J.S.A.* 59:3-1(a). Defendants knew at all times relevant hereto that crimes were being committed by defendant Previti, had actual notice and pleas for assistance from the plaintiff, but nonetheless failed to perform the ministerial function of law enforcement of basic police functions, such as rendering aid and assistance to those victimized by criminals such as Ronald Previti. Defendants knew of the special relationship created between the plaintiff and state police detectives, knew that the state police had commenced investigations as to the criminal acts of Previti, and knew terminating that investigation would leave the plaintiff without any police protection, lawful remedy or any ability to provide for his own health, safety and welfare.

27. Defendants did by virtue of the foregoing acts and omissions breach each and every duty of care due and owing the plaintiff and proximately caused the plaintiff to suffer damages and injuries.

WHEREFORE, plaintiff demands judgment against defendants as follows:

A. Compensatory damages;

B. Interest, attorney's fees and costs of suit; and

C. Any other relief the Court deems equitable and just.

COUNT FOUR

28. Plaintiff repeats and incorporates all previous allegations as if fully set forth herein.

29. Defendant Division of New Jersey State Police is a public entity defined under the New Jersey Tort Claims Act and it is liable for those injuries and damages proximately caused by the acts or omissions of its public employees within the scope of their employment as previously set forth in Count Three.

WHEREFORE, plaintiff demands judgment against the Division of New Jersey State Police pursuant to *N.J.S.A.* 59:2-2 as follows:

A. Compensatory damages;

B. Interest, attorney's fees and costs of suit; and

C. Any other relief the Court deems equitable and just.

RULE 4:5-1 CERTIFICATION

Pursuant to R. 4:5-1, I hereby certify that to the best of my knowledge, information and belief, the matter in controversy is not the subject of any other action pending in any Court or arbitration proceedings, and no other action is contemplated. I know of no other parties that should be joined herein.

JURY DEMAND PURSUANT TO R. 4:35-1

Plaintiff hereby demands Trial by jury as to all issues.

DESIGNATION OF TRIAL COUNSEL

Plaintiff hereby designates Louis M. Barbone, Esquire, as Trial Counsel in this case.

JACOBS & BARBONE, P.A.

BY: /s/ Louis Barbone
LOUIS M. BARBONE, ESQUIRE

DATED: September 18, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL D. PERNA, Plaintiff v. UNITED STATES OF AMERICA, RONALD R. PREVITE, [sic] JOHN J. TERRY, Special Agent of the Federal Bureau of Investigations, JAMES T. MAHER, Special Agent of the Federal Bureau of Investigations, NEW JERSEY DIVISION OF STATE POLICE, and JOHN DOES I-V, fictitiously named New Jersey State Police Officers, jointly, severally and in the alternative Defendants	NO. 00-CV-4647 (JAP) CIVIL ACTION

PROOF OF SERVICE

I, the undersigned, hereby certify that the original of the within Notice of Motion to Dismiss Complaint was filed with the Clerk of the United States District Court, District of New Jersey.

A copy of the within pleadings was forwarded via regular mail to:

Honorable Joel A. Pisano
Camden Vicinage
Mitchell H. Cohen U. S. Courthouse
1 John F. Gerry Plaza
P.O. Box 2797
Camden, NJ 08101

Louis M. Barbone, Esquire
JACOBS & BARBONE, P.A.
1125 Pacific Avenue
Atlantic City, NJ 08401

I hereby certify that the foregoing statements made by me are true. I hereby certify that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

RESPECTFULLY SUBMITTED,
GRIMES & GRIMES, L.L.C.

Dated: October 25, 2000 /s/ Joseph P. Grimes
BY: JOSEPH P. GRIMES, ESQUIRE
Attorney for defendant, Previte [sic]
GRIMES & GRIMES, L.L.C.
1230 Brace Road
Cherry Hill, NJ 08034
Phone: (856) 428-2299

Cop-turned-mobster describes his past at Merlino trial

By JIM WALSH
Courier-Post Staff

PHILADELPHIA

A former South Jersey Mobster took the witness stand Thursday against alleged Mafia boss Joseph "Skinny Joey" Merlino.

But Ronald Previte, a self-admitted mob *capo*, or captain, from Hammonton, spent much of the day recounting his own criminal activities and his role as a government informant.

Previte, 57, described shootings, beatings and other offenses committed as part of his mob activities and in his personal life.

He told jurors that he received almost $500,000 in payments from the FBI from 1992 to 2000 – and that he tried to hide the money from the Internal Revenue Service.

"I was a bad guy," said Previte as Assistant U.S. Attorney Zane Memegar appeared to establish his credentials as a knowledgeable mobster.

He is the third mob turncoat to testify at the federal racketeering trial of Merlino and six codefendants, including Cherry Hill resident George Borgese.

Jurors previously heard from former mob boss Ralph Natale and mob soldier Gaetano "Tommy Horsehead" Scafidi.

Previte, an FBI informant since 1992, said he committed some crimes, such as taking sports bets, with the government's knowledge. But he hid other crimes from authorities, including the extortion of a Hammonton bar owner in 1995-96.

Previte, who began his career as a corrupt cop in Philadelphia, said that he doctored urine samples while fixing horse races as an employee at Garden State Park in Cherry Hill and that he stole from patrons while working at Atlantic City casinos.

Previte, who is 6-foot-2 and weighs 280 pounds, said he twice fired guns over the heads of men suspected of stealing from him.

Previte also said he regularly warned authorities about plans by former mob boss John Stanfa of Medford to kill real or imagined enemies, including Merlino, during a 1993 mob war.

"It became pretty hairy back then," said Previte. "Everybody seemed like they wanted to kill each other."

Previte, who taped many conversations as a mob informant, is to resume testimony today.

Earlier this year, he was the chief prosecution witness at the federal trial in Camden of former Hammonton Police Detective James DeLaurentis, who was convicted of single counts of extortion and bribery.

Previte admits he was 'a crook'

Ronald Previte wasn't what you'd call a model employee.

The mob informant, taking the stand yesterday in the federal racketeering trial of Joseph "Skinny Joey" Merlino, started out as a corrupt police officer, became a dishonest casino employee and eventually fixed horse races while working for a New Jersey racetrack – all the while avoiding punishment by informing for various law enforcement agencies.

Honest about it

"I was a crook," said Previte, 57, one of the government's main witnesses against Merlino and six other reputed mobsters.

Previte, who had been a confidential informant for the New Jersey state police in the 1980s, began working with the FBI in 1992. He later agreed to wear a hidden microphone and recorded hundreds of conversations with Merlino and confessed mob boss Ralph Natale.

The tapes led to the indictment of Natale and Merlino on drug trafficking charges in 1999; Natale then became a government witness and testified 14 days in the Merlino trial.

FBI pays $8,610 a month

For his efforts, the FBI paid Previte more than $489,000 from 1992 to the present, according to documents. At one point, he was being paid $8,610 a month. Previte said yesterday. He avoided taxes on the money, but has since reached an agreement with the Internal Revenue Service to pay $35,690.

Previte, who is expected to testify for several weeks, began providing a detailed account of his dealings with the mob, particularly as a captain in the organization of convicted mob boss John Stanfa.

MICHAEL RUBINKAM/AP

ROBERT J. CLEARY
United States Attorney
By: JAMES B. CLARK, III, AUSA
970 Broad Street, Room 700
Newark, New Jersey 07102
(973) 645-6548
JC-7387

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MICHAEL D. PERNA, Plaintiff, v. UNITED STATES OF AMERICA, RONALD R. PREVITE, NEW JERSEY DIVISION OF STATE POLICE, AND JOHN DOES I-V, Defendants	Hon. Joel A. Pisano Civil Action No. 00-4647 DECLARATION OF JAMES T. MAHER

JAMES T. MAHER hereby declares as follows:

1. I am currently a Special Agent with the Federal Bureau of Investigation (FBI) and have been a Special Agent with the FBI for approximately 30 years. I make this declaration in connection with defendant United States of America's motion to have the Complaint against it in the above-captioned matter dismissed.

2. I am familiar with the facts set forth in this declaration and if called to testify as to same, I could do so competently.

3. Beginning in approximately 1992 and lasting until 1997, Ronald R. Previte, co-defendant in this action with the United States of America, served as a confidential informant for the Federal Bureau of Investigation.

4. In 1997, Mr. Previte ceased to serve as a confidential informant for the FBI and took on the role of cooperating witness, a role in which he continues to date.

5. During the period of time which serves as the focus of the complaint in this matter – roughly the middle of 1993 to the middle of 1994 – neither I nor Special Agent John Terry had any supervisory responsibilities concerning Mr. Previte in connection with his role as a confidential informant for the FBI. Special Agent Terry and I had direct dealings with Mr. Previte in that capacity beginning in 1995.

6. Notwithstanding the foregoing, I am familiar with the contacts other FBI Special Agents had with Mr. Previte during his first few years as an FBI confidential informant, and I am familiar with the general parameters governing Mr. Previte's activities relative to the FBI.

7. I am aware that from the outset of his service as a confidential informant for the FBI, Mr. Previte was repeatedly admonished that he was not serving as an employee of the FBI or of the United States of America. Moreover, at no time during his service as an FBI confidential informant did Mr. Previte have the authority to execute searches, seize evidence, or make arrests.

8. Assuming *arguendo* the truth of the allegations in the First count of the Complaint that Mr. Previte engaged in assault, battery, and other similar misconduct directed at the plaintiff, I am aware that no employees within the

FBI orchestrated or approved of such misconduct on Mr. Previte's part.

9. To my knowledge, prior to the filing of the present lawsuit, the plaintiff never sued either Mr. Previte or the FBI for the conduct now at issue, nor did the plaintiff even make any formal inquiry regarding whether the FBI had any relationship with Mr. Previte, cooperating or otherwise.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of December, 2000.

/s/ James T. Maher
JAMES T. MAHER

Exhibit A

AGREEMENT

Whereas, the Federal Bureau of Investigation, hereinafter referred to as the FBI, is conducting a lawful investigation of the Philadelphia La Cosa Nostra (LCN) Family members and associates; and

Whereas, RONALD M. PREVITE (hereinafter referred to as PREVITE) is in a position to and is willing to furnish assistance to the FBI in this regard; and

Whereas, the parties hereto desire to memorialize their respective interests and obligations;

Now, therefore, the parties hereto agree as follows:

I. RESPONSIBILITIES OF PARTIES

1) PREVITE will fully cooperate with the FBI and shall truthfully, completely and accurately disclose to the FBI all information concerning this investigation.

2) The FBI will reimburse PREVITE for expenses incurred by him in excess of those authorized under the attached Schedule A in furtherance of his assistance to the FBI, which are deemed by the FBI to be reasonable and related to this investigation. The parties agree that PREVITE shall obtain prior approval from the FBI's designated representative before incurring these expenses. The FBI has the right to approve or disapprove in advance any expense to be incurred in furtherance of its investigative goals.

3) All or parts of these payments may constitute taxable income to PREVITE. It shall be PREVITE'S responsibility to determine the tax consequence and to

report any to the appropriate Federal, state and local taxation authorities.

4) Prior to the termination of the covert phase of the investigation, PREVITE will be made aware of the provisions and availability of the Witness Security Program.

5) The FBI will provide PREVITE with payments throughout the term of this agreement as set forth in Schedule A from initiation of this agreement, until such time as set forth under paragraph I, 5) d), paragraph I, 5) e), or until such time as the agreement is terminated, in writing, by either party pursuant to clause 18 of this agreement. The amount of such payments, including the amount of relocation payment set forth under paragraph IV, 20) a), *infra*, shall in no way be dependent upon or affected by the outcome of any case in which PREVITE has assisted.

The FBI and PREVITE understand and hereby acknowledge:

a) that PREVITE will be required to testify and to participate in trial preparation;

b) that PREVITE's cooperation impacts upon PREVITE's ability to search for and secure regular employment;

c) that PREVITE's payments will continue after the end of the covert investigation and throughout Grand Jury action;

d) At the conclusion of PREVITE's Grand Jury preparation and testimony, the payments by the FBI described on the attached Schedule A will cease.

e) The FBI may resume payments to PREVITE to reimburse PREVITE for income lost, up to a cap of $4000 per month, if it is necessary for PREVITE to participate in trial preparation and to testify.

6) PREVITE agrees, at the direction of and under the supervision of the FBI, to meet with designated individuals and agrees to make or have made by the FBI consensual oral, video and wire recordings of such meetings and related telephone calls. Further, PREVITE shall provide written authorization to the FBI to monitor and record such meetings and conversations prior to such monitoring/recording. PREVITE also agrees to testify regarding same.

7) PREVITE agrees, when directed by the FBI, to be available and testify, and to furnish all information in his possession, custody or control, which he has received during the course of, or related to, this investigation. The costs associated with PREVITE's testimony shall be borne by the Government, in accordance with applicable Federal laws and regulations.

8) PREVITE shall not participate in any unlawful activities during the course of this investigation except insofar as the FBI determines that such participation is necessary to this investigation and the FBI expressly authorized such acts. It is understood that any such violations of the law not expressly authorized by the FBI, may result in the prosecution of PREVITE.

9) PREVITE will not initiate any plans to commit criminal acts, nor will he participate in any acts of violence. If he is asked to participate in any act of violence or

learns of such plans, he will attempt to discourage those plans or acts, and will promptly notify the FBI.

10) The FBI is responsible for the financing of all aspects of this investigation which, in its discretion, will further its investigative goals.

11) PREVITE is not a member of, a joint venture with, employee, associate, Agent, or partner of the FBI, nor will he identify himself or hold himself out to be such.

12) PREVITE shall have no authority, actual or implied, to obligate and/or bind the FBI to any contractual duty and/or obligation, and any obligations so made are the sole obligation of PREVITE and not the FBI.

13) It is understood that the FBI at its sole discretion will control all investigative activities, including any decision to terminate this investigation.

II. LIABILITY OF PARTIES

14) The liability for any negligent acts of FBI employees will be borne by the FBI. Liability for any negligent or willful acts of PREVITE, which acts were undertaken without prior express approval of the FBI, are the sole responsibility of PREVITE. However, PREVITE does not waive any rights or claims to which he is entitled under the Federal Tort Claims Act.

III. CONFIDENTIALITY

15) PREVITE will in no way reveal the confidential and sensitive nature of this investigation or identify any undercover agents. He will not undertake any publication or dissemination of any information or material that

results from this investigation without the prior express written authorization of the FBI, during the pendency of this agreement.

16) It is understood that all payments to PREVITE are contingent upon his compliance with the obligation of confidentiality of this investigation, as well as all other aspects of this agreement.

17) The FBI will maintain a confidential relationship with PREVITE, and to the extent permissible under Federal law and in keeping with FBI policy, protect his identity from disclosure. The parties further agree that this agreement, or any terms of this agreement, shall not be disclosed to any third party unless expressly authorized by the FBI, or in the event the Government is required to disclose this agreement or its contents pursuant to the Federal Rules of Criminal Procedure relating to relevant discovery or by court order.

IV. TERMINATION

18) This agreement shall remain in full force and effect until written notice of termination by one party hereto is delivered to the other party. Either party may terminate this agreement at anytime.

19) The parties further agree that the FBI may unilaterally elect to terminate any investigation involving PREVITE. However, the FBI remains obligated as required under Paragraph I), 5), c), paragraph I), 5), d) and paragraph I), 5), e) of this agreement.

20) When this agreement is terminated, the FBI shall consider financially assisting PREVITE as follows:

a) The FBI will consider providing PREVITE with a lump sum payment, in an amount to be determined by the FBI, to assist PREVITE in the relocation of PREVITE and his family. Among those expenses that the FBI will consider when making this payment are real estate broker commissions, transportation of household goods, closing costs, and two months subsistence assistance for PREVITE and his family upon their relocation.

b) The FBI will consider an additional lump sum payment, in an amount to be determined by the FBI, to PREVITE. Entitlement to any such additional payment will be determined solely by the FBI and will in no way be dependent upon or affected by the outcome of any case in which PREVITE has assisted.

V. ADDITIONAL AGREEMENTS

21) This document constitutes the full and complete agreement between PREVITE and the FBI. All modifications to this agreement shall be of no force and effect unless memorialized in writing and signed by all parties. In the event any provision of this agreement is deemed by any court of appropriate jurisdiction to be unenforceable or null and void, the parties agree that the remainder of this agreement shall remain in full force and effect, and the unenforceable provision shall be severed from this agreement.

22) This agreement shall be binding upon and shall inure to the benefit of the parties hereto, their heirs and legal beneficiaries.

23) The representative for the FBI contracting officer in this agreement is Special Agent JOHN J. TERRY.

24) Each party, by entering into this agreement, hereby represents that they have had adequate opportunity to review this matter, after review and advice of legal counsel, have read and understand the agreement, and agree to be bound by its terms.

IN WITNESS WHEREOF the parties intending to be legally bound hereby set their hands and seals the date and year below indicated.

/s/ Ronald M. Previte
RONALD M. PREVITE

_____
DATE

WITNESSES:

/s/ [Illegible]

/s/ [Illegible]

/s/ [Illegible]
For the Federal Bureau of Investigation

2-3-97
DATE

ADDENDUM

Whereas, the Federal Bureau of Investigation, hereinafter referred to as the FBI, and RONALD M. PREVITE, hereinafter referred to as PREVITE, entered into a "Service Agreement" on February 3, 1997; and

Whereas, pursuant to clause 21 of that agreement, it may be modified, in writing, by the parties,

Whereas, the parties hereto desire to make the following addition to the "Service Agreement" of February 3, 1997, the terms and conditions of which remain in full force and effect;

Now, therefore, the parties hereto agree as follows:

1) If any Federal, State or Local prosecutive agency attempts prosecutive/forfeiture action against PREVITE for any crime that had been previously expressly authorized by the FBI, the FBI, with PREVITE'S consent, will notify the appropriate prosecutive agency of PREVITE'S cooperation with the FBI and the FBI's prior approval for PREVITE to participate in certain crimes, as long as PREVITE fully disclosed the details of such crimes to the FBI prior to their commission and received the permission of the FBI to participate in those specific crimes prior to their occurrence.

2) The FBI will make bi-weekly or monthly payments to PREVITE in the amounts called for on Schedule A, attached to the February 3, 1997 Service Agreement.

IN WITNESS WHEREOF the parties intending to be legally bound hereby set their hands and seals the date and year below indicated.

/s/ Ronald M. Previte
RONALD M. PREVITE

2-20-97
DATE

WITNESSES:

/s/ [Illegible]
/s/ [Illegible]

/s/ Jack R. Cordes, Jr./JJ.
For the Federal Bureau of Investigation

2/20/97
Date

38 Fed.Appx. 807

United States Court of Appeals,
Third Circuit.

Zulay RENDON, Individually and as parent and natural guardian of Garcia, a minor, Appellant
v.
PHILADELPHIA HEALTH SERVICES;
Episcopal Hopsital [sic]; Dr. Harshad; K. Patel;
Lehigh Avenue Radiology Associates, Inc.;
United States of America

No. 01-1668.

Argued May 23, 2002.
Filed June 24, 2002.

On Appeal From the United States District Court For the Eastern District of Pennsylvania (D.C. Civil Action No. 99-cv-05912). District Judge: Honorable Edmund V. Ludwig.

Joan E. London, Kozloff Stoudt, Wyomissing, PA, John E. Muir (Argued), Roland & Schlegel, Reading, PA, for Appellant.

Michael L. Levy, United States Attorney, James G. Sheehan, Asst. United States Attorney, Chief, Civil Division, Annetta F. Givhan (Argued), Asst. United States Attorney, Philadelphia, PA, for Appellee United States of America.

Nancy K. Raynor, O'Brien & Ryan, Plymouth Meeting, PA, for Appellee Episcopal Hospital.

Kent & McBride, Philadelphia, PA, for Appellees K. Patel and Lehigh Avenue Radiology Associates, Inc.

Before MCKEE, STAPLETON and WALLACE,* Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge.

When the District Court granted summary judgment to the defendants in this medical malpractice case brought under the Federal Tort Claims Act, it did not have the benefit of our deicsion [sic] in *Hughes v. United States*, 263 F.3d 272 (3d Cir.2001). That FTCA case, like this one, involved a malpractice claim based on allegations that the defendants caused the plaintiff's injuries by negligently failing to diagnose and/or treat a condition that needed medical attention.

We held for the first time in ***Hughes*** that **"the FTCA's statute of limitations is not jurisdictional"** and that **"[f]ailure to comply with the statute is an affirmative defense which the defendant has the burden of establishing."** ***Id.*** **at 278.** The District Court in this case understandably treated the limitations issue as a jurisdictional one with the burden of proof on the plaintiff, and this approach may well have influenced its ultimate conclusions. Moreover, ***Hughes*** also provides new guidance on the application of the Supreme Court's decision in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) to a situation in which the alleged malpractice is a failure to diagnose and/or treat. *Id.* at 278.

---

* Honorable J. Clifford Wallace, United States Circuit Judge for the Ninth Circuit, sitting by designation.

We will vacate the judgment of the District Court and remand to provide an opportunity for the District Court to consider the issues here raised in light of the development of the relevant law in *Hughes*, 263 F.3d 272 (3d Cir.2001).

38 Fed.Appx. 807, 2002 WL 1369591 (3rd Cir.(Pa.))

28 U.S.C. § 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may have binding instructions or

require the entire record to be sent up for decision of the entire matter in controversy.

Supreme Court U.S.
FILED
JAN 27 2003
OFFICE OF THE CLERK

No. 02-787

In the Supreme Court of the United States

MICHAEL D. PERNA, PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
ROBERT S. GREENSPAN
STEPHANIE R. MARCUS
Attorneys
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QUESTION PRESENTED

Whether the applicable two-year statute of limitations, 28 U.S.C. 2401(b), bars petitioner's claim under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*

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In the Supreme Court of the United States

No. 02-787

MICHAEL D. PERNA, PETITIONER

v.

UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter*, but is reprinted at 36 Fed. Appx. 61. The opinion of the district court (Pet. App. 7-18) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5-6) was entered on June 5, 2002. A petition for rehearing was denied on August 26, 2002 (Pet. App. 21-22). The petition for a writ of certiorari was filed on November 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner filed this damages action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The United States District Court for the District of New Jersey granted summary judgment for the United States, and the court of appeals affirmed. See Pet. App. 1-4, 11-16.

1. The applicable limitations provision of the FTCA, 28 U.S.C. 2401(b), provides in pertinent part that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court interpreted Section 2401(b) in the context of a medical malpractice suit against a veterans' hospital. The plaintiff alleged that his hearing loss was caused by the hospital's negligent administration of an antibiotic. The court of appeals believed that accrual of the plaintiff's FTCA claim depended on when the plaintiff "knew or could reasonably be expected to know that in the eyes of the law, the [antibiotic] treatment constituted medical malpractice." *Id.* at 118. This Court rejected the court of appeals' view. In so doing, the Court noted "that the general rule under the [FTCA] has been that a tort claim accrues at the time of the plaintiff's injury," although knowledge of the cause of injury also may be required for the two-year period to run in medical malpractice cases. *Id.* at 120.

2. Petitioner alleges that in 1993 and 1994, respondent Ronald Previti committed torts—including assault, battery, false imprisonment, and extortion—against him while acting as a confidential informant for the Federal Bureau of Investigation (FBI). Pet. App. 2. Petitioner claims that the FBI failed to prevent

Previti from committing those torts and "provide[d] Previti with a badge of authority upon which to perpetrate crime[s] against [petitioner]." *Id.* at 8 (quoting Pet. Compl. ¶ 17).

In October 1995, petitioner filed an administrative complaint against Previti with the United States Department of Labor's Office of Organized Crime and Racketeering. Pet. App. 9. The Department terminated its investigation when petitioner refused to cooperate. *Ibid.*

Petitioner alleges that he did not know of Previti's role as an FBI informant until June 29, 1999, when he learned about it through a newspaper article. Pet. App. 10; Pet. 4 & n.2. Petitioner states that he filed a notice of his FTCA claim with the FBI on October 20, 1999.[1] Pet. 4. In September 2000, petitioner filed his federal court complaint containing the FTCA claim. See generally 28 U.S.C. 2401(b) (tort claim against United States must be brought within six months of agency's final denial of claim).[2]

3. The district court determined that petitioner failed to present his FTCA claim to the FBI within two years of the date on which the claim accrued, and therefore granted summary judgment for the United States. Pet. App. 11-16. The district court explained that un-

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[1] Because the record before the district court indicated only that petitioner filed his administrative claim in 1999, the district court assumed (in petitioner's favor) that the claim was filed on January 1, 1999. See Pet. App. 11 n.2.

[2] Petitioner also asserted claims against Previti, individual federal agents, the New Jersey Division of State Police, and individual state police officers. See Pet. App. 8. The district court dismissed all those claims. See *id.* at 17-18. The petition, however, addresses only petitioner's FTCA claim against the United States. See Pet. i, 4, 7-12.

der the Third Circuit's decision in *Zeleznik* v. *United States*, 770 F.2d 20 (1985), cert. denied, 475 U.S. 1108 (1986), an FTCA claim "accrues when the injured party learns of the injury and its immediate cause." Pet. App. 13 (quoting *Zeleznik*, 770 F.2d at 23). As the district court further explained, *Zeleznik*'s "injury and immediate cause" rule applies even if a reasonable investigation, commenced at the time when the injury and its immediate cause became known, would not have revealed the government's involvement in the alleged tort. *Id.* at 13-14, 16; see *Zeleznik*, 770 F.2d at 23-24.

Applying *Zeleznik*, the district court emphasized that petitioner "learned of his injury between 1993 and 1994 when the alleged assault, battery, false imprisonment, and extortion occurred and he knew at least one possible defendant, Previti, was responsible for his injuries." Pet. App. 14. Nonetheless, the court noted, petitioner "did not promptly file an action against Previti; instead he waited more than six years to assert such claims." *Ibid.*

The district court rejected petitioner's argument that his FTCA claim did not accrue until he actually discovered the government's alleged involvement in June 1999. Pet. App. 11-12, 14. The court reiterated that "the critical facts about causation and who inflicted [petitioner's] injury was [sic] known to him in 1994." *Id.* at 16. The court added that "equitable considerations do not warrant the tolling of the statute of limitations" in this case because petitioner "has not presented any evidence that United States-Defendants in any way obstructed his efforts to sue Previti, seek protection from Previti's violent acts, or discover his status as a confidential informant for the FBI." *Ibid.*

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-4. The court of ap-

peals stated that under its decision in *Zeleznik* "[t]he statute of limitations begins to run on the first date that the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." *Id.* at 3 (quoting *Zeleznik*, 770 F.2d at 23). The court concluded that the statute of limitations therefore bars petitioner's claim "[b]ecause the record clearly establishes that the action was filed more than two years after the accrual of [petitioner's] injuries." *Id.* at 4.

ARGUMENT

The court of appeals correctly determined that petitioner's claim under the Federal Tort Claims Act accrued no later than 1994, when Previti's alleged torts were complete. At that point, petitioner knew that he was injured, knew that Previti caused his injury, and was on notice of the need to investigate the surrounding circumstances. The court of appeals' unpublished decision does not conflict with any decision of this Court or any other court of appeals. Further review therefore is not warranted.

1. Under the FTCA, a tort claim against the United States is time-barred "unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b). That two-year limitation, like other statutes of limitations, "represent[s] a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979) (internal quotation marks and citation omitted).

In *Kubrick* the government conceded, and the Court assumed, that accrual of FTCA claims in the medical malpractice context is governed by a "discovery rule" under which "the 2-year period d[oes] not begin to run until the plaintiff has discovered both his injury and its cause." 444 U.S. at 120; see *id.* at 120-121. But this Court never has endorsed application of the discovery rule in FTCA cases outside the medical malpractice context. To the contrary, the Court recently rejected the view that "a generally applied discovery rule" is implicit in federal statutes of limitations. *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 447 (2001).

2. In this case, the court of appeals applied the discovery rule in an FTCA action outside the medical malpractice area. As the court of appeals concluded, however, petitioner's FTCA claim was untimely even under that plaintiff-friendly approach.

Petitioner argues (Pet. 12) that his FTCA claim did not accrue until he knew (or in the exercise of reasonable diligence should have known) that Previti was an FBI informant. See Pet. 10-12. Yet under the discovery rule "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). Sometimes, discovery of the injury's cause also may be required to "start[] the clock," see *id.* at 555-556 (quoting *Kubrick*, 444 U.S. at 122), but discovery of the cause of an injury "does not mean knowing who is responsible for it. The 'cause' is known when the immediate physical cause of the injury is discovered." *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) (per Kennedy, J.).

Therefore, "[t]he well-established rule is that once a prospective plaintiff learns of his injury, he is on notice that there may have been an invasion of his legal rights and that he should investigate whether another may be

liable to him." *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 744 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); accord *Garza* v. *United States Bur. of Prisons*, 284 F.3d 930, 935 (8th Cir. 2002); *Zeleznik* v. *United States*, 770 F.2d 20, 22-23 (3d Cir. 1985), cert. denied, 475 U.S. 1108 (1986); *Richman* v. *United States*, 709 F.2d 122, 123-124 (1st Cir. 1983) ("[I]f a pedestrian were struck by a negligent driver, the statute would run in favor of his undisclosed employer, and the barkeeper who allowed him to drink too much, even if the pedestrian were ignorant of their existence."); *Steele* v. *United States*, 599 F.2d 823, 828-829 (7th Cir. 1979). Consistent with that settled principle, the court of appeals held in this case that petitioner's claim accrued "on the first date that [he] possesse[d] sufficient critical facts to put him on notice that a wrong [was] committed and that he need investigate to determine whether he is entitled to redress." Pet. App. 3 (quoting *Zeleznik*, 770 F.2d at 23).

3. a. Petitioner contends (Pet. 8-12) that the court of appeals' decision conflicts with a line of decisions in which courts, including the Third Circuit itself, have held that a cause of action under the FTCA does not accrue at the time of injury if the plaintiff was "blamelessly unaware" (*Diaz* v. *United States*, 165 F.3d 1337, 1339 (11th Cir. 1999)) of the government's alleged role in the injury. The cases on which petitioner relies involved plaintiffs who reasonably did not know at the time of their injury of *any cause* that might, after diligent investigation, give rise to a potential tort claim. In contrast, petitioner knew by 1994 the "critical facts" that "put him on notice that a wrong [was] committed and that he need investigate to determine whether he is entitled to redress." Pet. App. 3 (quoting *Zeleznik*, 770 F.2d at 23). See *Dyniewicz*, 742 F.2d at 486 ("With

knowledge of the fact of injury and its cause * * * [t]he burden is then on plaintiff to ascertain the existence and source of fault within the statutory period.") (citation omitted); cf. *Kubrick*, 444 U.S. at 122-123 (FTCA action accrues despite plaintiff's unawareness that his known injury is legally actionable). Thus, whether or not the line of cases on which petitioner relies correctly applies the FTCA's limitations rule, it is inapposite.

Drazan v. *United States*, 762 F.2d 56 (7th Cir. 1985), for example, is a medical malpractice case in which the plaintiff's husband was treated for tuberculosis at a Veterans Administration hospital. During the husband's treatment, a radiology report showed a possible tumor. The report suggested a follow-up examination, but that examination was not conducted. A year later, the husband was diagnosed with lung cancer, which proved fatal. See *id.* at 57. The Seventh Circuit held that the plaintiff's wrongful death claim under the FTCA did not accrue when she learned of the physical injury that caused her husband's death (*i.e.*, lung cancer). Rather, the claim accrued when the plaintiff became aware (or in the exercise of reasonable diligence should have become aware) that her husband may have suffered doctor-caused harm. *Id.* at 58-59. It was in that context of two potential causes, only one of which was possibly tortious, that the *Drazan* court stated that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." *Id.* at 59.

The decision below therefore does not conflict with the Seventh Circuit's failure-to-diagnose analysis in *Drazan*. Indeed, as petitioner acknowledges (Pet. 9),

the Third Circuit recently followed *Drazan* in a case involving an alleged failure to diagnose and treat a medical condition. See *Hughes* v. *United States*, 263 F.3d 272, 277 (3d Cir. 2001). The decision below is consistent with *Hughes*, but even if it were not, any tension between this unpublished decision and the earlier published decision of the Third Circuit would not provide a basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

The Eleventh Circuit's decision in *Diaz*, *supra*, also involved a wrongful death claim arising from the government's alleged failure to provide medical treatment to the plaintiff's husband. See 165 F.3d at 1338-1339. The immediate cause of the husband's death—suicide—did not suggest the possibility of tortious conduct by any party and the court, following *Drazan* in the specific context of a wrongful death action, therefore concluded that the plaintiff was not under a duty to investigate the identity of possible tortfeasors at that time. *Id.* at 1340-1341.

Kronisch v. *United States*, 150 F.3d 112 (2d Cir. 1998), is similarly distinguishable. The plaintiff in *Kronisch* brought an FTCA claim in 1981, alleging that in 1952 an operative of the Central Intelligence Agency administered hallucinogenic drugs to him without his knowledge or consent, causing permanent injuries. *Id.* at 119-120. The Second Circuit held that the claim accrued during the late 1970s, rather than in 1952. *Id.* at 121-123. But like *Drazan* and *Diaz*, *Kronisch* was a case in which the plaintiff did not have reason to suspect at the time of the alleged injury that the injury might have arisen from any tortious conduct. See *id.* at 121.

b. Petitioner also suggests (Pet. 9-11) a conflict between the decision below and the Eighth Circuit's decision in *Garza, supra*, but the holding in *Garza* is entirely consistent with the Third Circuit's decision in this case. In *Garza*, a federal convict murdered his wife after escaping from a private halfway house. The representative of the wife's estate brought an FTCA claim, alleging that a federal employee negligently failed to notify law enforcement agencies or the wife that the convict had escaped. 284 F.3d at 933. The FTCA claim was presented more than two years after the wife's murder. The plaintiff, however, argued that the claim did not accrue until he discovered that the person responsible for the failure to warn was a federal employee, rather than an employee of the halfway house. *Id.* at 936.

The Eighth Circuit held that the plaintiff's FTCA claim was time-barred. *Garza*, 284 F.3d at 936-938. It noted that "the statute of limitations under the FTCA 'does not wait until a plaintiff is aware that an alleged tort-feasor is a federal employee,'" *id.* at 935 (quoting *Gould*, 905 F.2d at 745), and that "[w]here the government or its agents have not misled or deceived a plaintiff, or otherwise hidden the legal identity of alleged tortfeasors as federal employees, the cause of action still accrues *when the existence of an injury and its cause are known.*" *Ibid.* (emphasis added); accord *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir.), cert. denied, 469 U.S. 842 (1984) (accrual of FTCA claim can be deferred because of lack of knowledge of identity of tortfeasor only when "the United States itself played a wrongful role in concealing the culprit's identity"). Applying those principles, the Eighth Circuit explained that "from the time [the murdered wife's] body was discovered, inquiry was in order into the tragically obvious

questions of whether she had been notified of [the convict's] escape, whether anyone was responsible to make such notification and, if so, whom." *Garza*, 284 F.3d at 936.

In this case, the district court determined that petitioner "learned of his injury between 1993 and 1994 when the alleged assault, battery, false imprisonment, and extortion occurred and he knew at least one possible defendant, Previti, was responsible for his injuries." Pet. App. 14. The district court further determined that petitioner "did not promptly file an action against Previti; instead he waited more than six years to assert such claims." *Ibid.* Petitioner likewise did not cooperate in the Department of Labor's investigation of his administrative complaint against Previti, causing the Department to dismiss the complaint. *Id.* at 9. And as the district court also concluded, petitioner "has not presented any evidence that United States-Defendants in any way obstructed his efforts to sue Previti, seek protection from Previti's violent acts, or discover his status as a confidential informant for the FBI." *Id.* at 16. On those facts the court of appeals correctly determined (*id.* at 3), consistent with *Garza*, that petitioner's tort claim accrued when petitioner knew of his injury from Previti's conduct, not when he discovered that the alleged defendant's actions might be traceable to the federal government. Therefore, it was irrelevant whether petitioner would have discovered Previti's status as an FBI informant if petitioner had undertaken a timely and diligent investigation. *Ibid.*

The decision below is correct and does not implicate any conflict in the circuits. Moreover, the unpublished decision could not contribute to a circuit split in any event.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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